No. 80-1516

IN THE

Supreme Court of the United States

October Term, 1980

MARY LOBUE,

Petitioner,

v.

THE STATE OF NEVADA, *ex rel.*
Department of Highways,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Jurisdiction 2

This Court Lacks Jurisdiction Under 28 U.S.C. § 1257(3) Because the Petitioner, Mary LoBue, Failed to Properly Raise Her Federal Question in the Nevada Supreme Court 2

A. Mere Reference to the State and Federal Constitutions is Insufficient to Notice the State Court That a Federal Right is Being "Specially Set Up or Claimed" 2

B. The Federal Right Claimed in the Petition for Rehearing Came Too Late 3

Statement of the Case 7

Reason Why the Writ Should be Denied 10

I

Assuming, Arguendo, That Petitioner Preserved the Constitutional Issue of the Alleged Expropriation of Her Property in Violation of the Fifth and Fourteenth Amendments to the United States Constitution, the Writ Should be Denied for the Simple Reason That There was No Taking 10

Conclusion 13

APPENDICES

		Page
Appendix A.	Opinion of the Nevada Supreme Court, June 4, 1980, 96 Nev. 505, 611 P.2d 1077	15
Appendix B.	Page 1 of Petitioner Mary LoBue's Opening Brief on Cross-appeal to the Nevada Supreme Court	19
Appendix C.	Page 7 of Petitioner Mary LoBue's Reply Brief to the Nevada Supreme Court	21
Appendix D.	Pages 17, 18 and 19 of Petitioner Mary LoBue's Petition for Rehearing to the Nevada Supreme Court	23
Appendix E.	Opinion of the Nevada Supreme Court, May 18, 1967, 83 Nev. 221, 427 P.2d 639	27
Appendix F.	Order of the Nevada Supreme Court, November 26, 1969, Dismissing Petitioner Mary LoBue's Appeal from the 1967 Condemnation Trial	37

TABLE OF AUTHORITIES

Cases

Page

Appleby v. Buffalo, 221 U.S. 524 (1911) 12
Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930) 4
Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902)..... 3
Chicago, Burlington B&Q R. Co. v. Chicago, 166 U.S. 226 (1897)..... 12
Clark v. Clark, 80 Nev. 52, 389 P.2d 69 (1964) 5
Great Northern Ry. Co. v. Sunburst Co., 287 U.S. 358 (1932) 4
Harding v. Illinois, 196 U.S. 78 (1904) 3, 11
Herndon v. Georgia, 295 U.S. 441 (1935) 3, 4, 5
Houston North Shore Ry. Co. v. Tyrrell, 128 Tex. 248, 98 S.W.2d 786 (1936) 10
Hughes v. North Carolina State Highway Com'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968) 10
In Re Simmons, 5 N.C. App. 81, 167 S.E.2d 857 (1969) 10
LoBue v. State ex rel. Dep't Hwys., 92 Nev. 529, 554 P.2d 258 (1976)..... 9
LoBue v. State ex rel. Dep't Hwys., 87 Nev. 372, 487 P.2d 506 (1971)..... 9
Missouri v. Gehner, 281 U.S. 313 (1930)..... 4
New York Central R.R. Co. v. New York, 186 U.S. 269 (1902) 3
Oxley Stave Co. v. Butler County, 166 U.S. 648 (1897) 2
State ex rel. Dep't Hwys. v. LoBue, 96 Nev. 505, 611 P.2d 1077 (1980) 1
State ex rel. Dep't Hwys. v. LoBue, 83 Nev. 221, 427 P.2d 639 (1967) 8, 10
Westcott v. State Highway Commission, 262 N.C. 522, 138 S.E.2d 133 (1964)..... 10

Statutes

Page

United States Code, Title 28, Sec. 1257(3) 2, 6

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of Nevada, *ex. rel.* Department of Highways (hereinafter, respondent State of Nevada) respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Nevada Supreme Court's opinion in this case. That opinion is reported at 96 Nev. 505, 611 P.2d 1077.

JURISDICTION

THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. § 1257(3) BECAUSE THE PETITIONER, MARY LoBUE, FAILED TO PROPERLY RAISE HER FEDERAL QUESTION IN THE NEVADA SUPREME COURT.

On page 8 of her petition, Mary LoBue states that she raised the federal question now presented ". . . in her Opening Brief on Cross-Appeal [p. 1], in her Reply Brief [p. 7], and more extensively in her Petition for Rehearing [pp. 18-19] on the fourth appeal." However, as the following argument sets forth, the referenced portions of her appellate briefs were insufficient to notice the state court that a federal right was being claimed and her attempt to claim this right in a petition for rehearing came too late.

A. MERE REFERENCE TO THE STATE AND FEDERAL CONSTITUTIONS IS INSUFFICIENT TO NOTICE THE STATE COURT THAT A FEDERAL RIGHT IS BEING "SPECIALLY SET UP OR CLAIMED."

This Court stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897), that:

> [T]he words "specially set up or claimed" imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare "specially," that is, unmistakably, this court is without authority to reexamine the final judgment of the state court. This statutory requirement is not met

> if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference.
>
> . . .
>
> Upon like grounds the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.

Specifically, this Court has held that mere reference to the "state and Federal Constitution"[1], or the Constitution of the United States"[2], is insufficient to properly raise a federal question before the state court.

It is therefore submitted that petitioner's reference to the "state and federal constitutions" on page 1 of her opening brief on cross appeal (Appendix "B") and on page 7 of her reply brief (Appendix "C") were insufficient to specially set up and claim the federal question she now presents. This conclusion is buttressed by the unanimous decision of the Nevada Supreme Court (Appendix "A") wherein no language may be found which even suggests that a federal question was raised on appeal, much less decided.

B. THE FEDERAL RIGHT CLAIMED IN THE PETITION FOR REHEARING CAME TOO LATE.

Petitioner Mary LoBue apparently recognized her jurisdictional dilemma and sought to avoid the same by filing a

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[1] *New York Central R.R. Co. v. New York*, 186 U.S. 269, 272-273 (1902).

[2] *Herndon v. Georgia*, 295 U.S. 441, 442-443 (1935); *Harding v. Illinois*, 196 U.S. 78, 88 (1904); *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 248 (1902).

petition for rehearing wherein she alleges on page 17 (notwithstanding her previous averments discussed above) that the decision ". . . has now, for the first time, presented serious State and Federal Constitutional questions . . .". (Appendix "D") However, as Mr. Justice Sutherland stated in *Herndon v. Georgia,* 295 U.S. at 443: "The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." (Citations omitted.)

An exception to this rule arises where the decision of the state court could not have been anticipated and a petition for rehearing presents the first opportunity for raising the federal claim.[3] Undoubtedly, petitioner Mary LoBue by alleging in her petition for rehearing that the decision of the Nevada Supreme Court presented "for the first time" certain federal constitutional questions, hopes to come within this exception.

Previous opinions of this Court which recognized this exception involved the following situations: A state court judgment which construed a statute and such construction, for the first time, infringed upon federal rights[4]; a judgment which unexpectedly overruled a line of prior decisions by the Court[5]; and a judgment which uniquely construed a statute to mean "one thing for some cases and another thing for others."[6] In each case, this Court concluded that the decision by the state court could not have

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[3]*Missouri v. Gehner,* 281 U.S. 313, 320 (1930); *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673, 677-678 (1930).

[4]*Missouri v. Gehner, supra* note 3.

[5]*Brinkerhoff-Faris Co. v. Hill, supra* note 3.

[6]*Great Northern Ry. Co. v. Sunburst Co.,* 287 U.S. 358, 367 (1932).

been anticipated during the original proceedings before such court.

Conversely, this Court in *Herndon v. Georgia,* 295 U.S., at 466, held that a litigant cannot "plead ignorance" to prior decisions of a state court, and was bound to anticipate the application of such prior rulings to his own case, and to preserve his right to review in this Court by appropriate action upon the original hearing in the state court. Upon these grounds the Court found "without substance" the contention that the petition for rehearing provided the first opportunity to raise the federal question and the appeal was dismissed for want of jurisdiction.

Similarly, petitioner Mary LoBue cannot "plead ignorance" to the well-recognized estoppel doctrines which form the basis of the decision she now assails. (Appendix "A") These doctrines were discussed at length in *Clark v. Clark,* 80 Nev. 52, 389 P.2d 69 (1964). Further, these estoppel doctrines were not applied *sua sponte* by the Nevada High Court as they were fully discussed by respondent State of Nevada in the briefs on appeal. Moreover, and prior to the appeal, it appears petitioner Mary LoBue fully recognized that the application of these estoppel doctrines could result in the very conclusion ultimately reached by the Nevada Supreme Court. At the trial court level of this matter, the doctrines of judicial and collateral estoppel were fully set forth by respondent State of Nevada in a motion in limine. In opposition to such motion, petitioner Mary LoBue stated that should the trial court grant the motion "there would effectively be no trial."

It is therefore submitted that petitioner Mary LoBue

should have anticipated the possibility of an adverse decision by the Nevada Supreme Court based upon the application of these estoppel doctrines and set forth her federal claim in the appellate briefs. Instead, she waited until her petition for rehearing, which under the foregoing analysis, came too late.

Accordingly, it appears the petition for writ of certiorari does not fall within the jurisdictional requirements of 28 U.S.C. 1257(3) and should therefore be denied.

STATEMENT OF THE CASE

On March 4, 1957, Petitioner and her husband, Vincent LoBue, executed a deed by which they conveyed a 70-foot strip (containing 3.8 acres) and a 40-foot strip (containing 0.37 of an acre) of land for the purposes of extending Bond (now Tropicana Avenue) and Industrial roads, respectively. As stated by the Nevada Supreme Court in the decision to which the petition is directed, "No representations were made as to the width or quality of those roads." (Appendix "A") The County of Clark on September 6, 1962, conveyed these strips of land to the State of Nevada, who utilized the same for the purpose of constructing Interstate 15 and Tropicana Avenue.

On April 17, 1963, the State filed its complaint to condemn 5.19 acres owned by petitioner. On March 17, 1966, petitioner moved for leave to file a counterclaim which sought to have the State pay for an additional area of 4.18 acres which had been conveyed to the County of Clark by said deed of March 4, 1957, and which had been conveyed to the State by quitclaim deeds. On March 30, 1966, the parties entered into a stipulation which provided that the parties would submit the issue of the validity of the LoBue deed to the court on an agreed statement of facts and written briefs, that the County of Clark need not be made a party, and that LoBue could assert against the State "any and all legal rights and remedies that defendant may have or may have had as against the County of Clark." The trial court canceled the deed on the ground of failure of consideration and permitted petitioner to file her counterclaim on July 9, 1966, by which the State was compelled to pay for an additional 3.8 acres conveyed by the March 4, 1957, deed. The State was compelled to compensate LoBue

for the additional 3.8 acres rather than 4.18 acres, as it was ascertained that the 5.19 acres being condemned already included the 40-foot strip conveyed for purposes of constructing Industrial Road.

Upon the State's appeal, the Supreme Court in *State ex rel. Dept. Hwys. v. LoBue,* 83 Nev. 221, 225, 427 P.2d 639 (1967) (Appendix "E"), held that the "ruling below vesting ownership of the disputed parcel in LoBue, thus subjecting that parcel to the condemnation suit, was clearly erroneous," and that "in these circumstances, the grantor's (LoBue) remedy for the failure of Clark County to construct the roads is an action at law for damages; not a suit in equity to cancel the deed." After holding the ruling below to be erroneous, which ruling and counterclaim had compelled the State to pay the fair market value of 3.8 acres conveyed by the March 4, 1957, deed, the court stated:

> Therefore, we reverse and remand for another trial to determine just compensation, severance damages, and benefits, if any, due to the State's condemnation of the two parcels totaling 5.19 acres. The disputed parcel (3.80 acres) is removed from this litigation and the State's title thereto confirmed.

On September 18, 1967, the retrial of the action to condemn 5.19 acres, including access rights to the freeway and approximately 1492 feet of access to Tropicana Avenue, was commenced. Further, as found by the Nevada Supreme Court (Appendix "A"):

> At that trial the jury specifically was instructed to determine the damages sustained by LoBue for the loss of frontage and access along the northerly and westerly boundaries of her property and for the loss

> of the corner. That damage was assessed at $93,777.97. From that amount was deducted the sum of $38,904 representing the benefits LoBue received from the State's construction of the freeway and Tropicana. Judgment was entered on that verdict and has been paid by the State.

From this 1967 judgment, petitioner Mary LoBue did appeal to the Nevada Supreme Court; however, on November 26, 1969, the appeal was dismissed. (Appendix "F")

Thereafter, all litigation in this action was upon petitioner Mary LoBue's counterclaim for breach of contract. In 1971, summary judgment in favor of respondent State of Nevada dismissing petitioner's counterclaim was reversed (87 Nev. 372, 487 P.2d 506); in 1976, a judgment upon jury verdict in favor of the State was reversed (92 Nev. 529, 554 P.2d 258); and in 1980, the Nevada Supreme Court issued the decision which is the basis for the present petition for writ of certiorari. (Appendix "A")

REASON WHY THE WRIT SHOULD BE DENIED

ASSUMING, ARGUENDO, THAT PETITIONER PRESERVED THE CONSTITUTIONAL ISSUE OF THE ALLEGED EXPROPRIATION OF HER PROPERTY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE WRIT SHOULD BE DENIED FOR THE SIMPLE REASON THAT THERE WAS NO TAKING.

Fourteen years ago, the first decision of the Nevada Supreme Court in *State ex rel. Department of Highways v. LoBue,* 83 Nev. 221, 427 P.2d 639 (1967) confirmed the respondent's title to the 3.8 acres in question. (Appendix "E") Mary LoBue's allegation in her petition that this 3.8 acres was expropriated or taken without the payment of just compensation is merely a pretext to invoke federal jurisdiction. The respondent State of Nevada cannot take, in violation of the Fifth and Fourteenth Amendments, land to which it holds title. As stated by the Supreme Court of North Carolina in *Westcott v. State Highway Commission,* 262 N.C. 522, 138 S.E.2d 133, 136 (1964): " 'The phrase 'eminent domain' by definition admits condemnor did not own, but took or appropriated the property of another for a public use.' "[7]

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[7]See also *Hughes v. North Carolina State Highway Commission,* 2 N.C.App. 1, 162 S.E.2d 661 (1968); *In Re Simmons,* 5 N.C.App. 81, 167 S.E.2d 857 (1969); *Houston North Shore Ry. Co. v. Tyrrell,* 128 Tex. 248, 98 S.W.2d 786 (1936).

The State will not belabor this brief by discussing the cases cited by petitioner or pages 19-21 of her petition. They involve a taking or impairment of access rights for which no compensation was paid. Petitioner Mary LoBue's only possible claim for a taking involved the loss of frontage and access along the northerly and westerly boundaries of her property and for the loss of a corner at that intersection. However, as stated in the Nevada Supreme Court's decision (Appendix "A"):

> This particular claim of damage previously had been litigated in the second condemnation trial. [1967] At that trial the jury specifically was instructed to determine the damages sustained by LoBue for the loss of frontage and access along the northerly and westerly boundaries of her property and for the loss of the corner. . . . Judgment was entered on that verdict and has been paid by the State. It is conclusive upon the parties and not subject to relitigation. (Citation omitted.)

It should be noted that from this 1967 judgment, petitioner Mary LoBue did appeal to the Nevada Supreme Court; however, her appeal was dismissed for failure to comply with rules of appellate procedure. (Appendix "F") It is, therefore, submitted that petitioner Mary LoBue has, at this late date, waived her right to attack, directly or indirectly, the validity of the 1967 condemnation judgment wherein she was awarded "just compensation" for the property and property rights so acquired. As stated by this court in *Harding v. Illinois,* 196 U.S. at 88: "There is nothing to prevent a party from waiving a Federal right of this character [deprivation of property without due process of law] if he chooses to do so, either in express terms or as a

necessary implication from his manner of proceeding in the case."

Therefore, the State of Nevada "has provided adequate machinery for the ascertainment of compensation" *(Appleby v. Buffalo,* 221 U.S. 524, 532 (1911)), and petitioner was not prevented "from obtaining substantially any compensation" *(Chicago, Burlington B&Q R. Co. v. Chicago,* 166 U.S. 226, 247 (1897) so as to constitute a denial of due process enjoined by the Fourteenth Amendment.

The gravamen of petitioner Mary LoBue's argument is contained in her statement of the question presented, i.e., the decisions of the Nevada Supreme Court "[have] effectively deprived a property owner of any remedy to recover just compensation for property which has been taken for public use." Apparently, the remedy, to which petitioner is referring, is her remedy for breach of contract. However, as stated in the opinion (Appendix "A"), petitioner's claimed loss in her contract action was for the same loss for which she received compensation in the 1967 condemnation trial. Obviously, petitioner hoped to recover some additional damages in her breach of contract action.[8] However, the failure to recover damages in her breach of contract action to augment those damages petitioner received in the condemnation action cannot be converted into a "taking."

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[8]Certainly, petitioner cannot claim surprise that she did not recover any additional damages in her breach of contract action. As pointed out by the Nevada Supreme Court: "Our prior opinions had advised the trial court that the measure of damages was the value of the benefit expected by LoBue less the value of the benefit received. Indeed, we noted that she may have received more than she had bargained for." (Appendix "A".)

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

William M. Raymond
Counsel for Respondent

APPENDIX A

Opinion

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA EX REL. DEPARTMENT OF HIGHWAYS, APPELLANT AND CROSS-RESPONDENT, *v.* MARY LOBUE, RESPONDENT AND CROSS-APPELLANT.

No. 11321

June 4, 1980

Appeal and cross-appeal from final judgment entered on jury verdict; Eighth Judicial District Court, Clark County; Howard W. Babcock, Judge.

Reversed with direction to enter judgment for the State.

Richard Bryan, Attorney General, and *Robert A. Calloway,* Deputy Assistant Counsel, Department of Highways, for Appellant and Cross-Respondent.

Foley Brothers, of Las Vegas, and *Ned R. Nelsen,* of Los Angeles, California, for Respondent and Cross-Appellant.

OPINION

Per Curiam:

This cause twice has been remanded to determine damages, if any, owed LoBue by the State. State ex rel. Dep't Hwys. v. LoBue, 83 Nev. 221, 427 P.2d 639 (1967); LoBue v. State ex rel. Dep't Hwys., 92 Nev. 529, 554 P.2d 258

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(1976). On this appeal and cross-appeal each party complains of the manner in which the trial court permitted the jury to determine damages.

In 1957 LoBue unconditionally deeded land to Clark County upon representations that the County would build two roads along the northerly and westerly sides of her remaining property. No representations were made as to the width or quality of those roads. LoBue expected that the construction of those roads would enhance the value of her remaining property. The roads promised by the County in 1957, eventually were constructed by the State in 1966.[1] The road along the northern part of her property is Tropicana Avenue, and a freeway was constructed along the westerly side of her property.

In our first opinion, State ex rel. Dep't Hwys. v. LoBue, 83 Nev. 221, 427 P.2d 639 (1967), we held that LoBue's remedy for the failure to construct the roads was an action at law for damages. We did not know whether she had sustained damage. We stated: "We express no opinon on the point of damages. Perhaps the highway construction by the State benefited LoBue as much as the originally planned county roads; perhaps not." Id. at 226. That expression was reaffirmed in LoBue v. State ex rel. Dep't Hwys., 92 Nev. 529, 554 P.2d 258 (1976).

The benefit for which LoBue had bargained was the increased value of her land by reason of the promised county roads. Those roads were not constructed. In lieu thereof, the State subsequently constructed a freeway and

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[1]In 1971 an issue arose as to whether the State was obliged to defend LoBue's claim for damages originally asserted against Clark County, the State's predecessor in interest. We ruled that the State was obliged to defend. LoBue v. State ex rel. Dep't of Hwys., 87 Nev. 372, 487 P.2d 506 (1971).

Tropicana Avenue. Our prior opinions had advised the trial court that the measure of damages was the value of the benefit expected by LoBue less the value of the benefit received. Indeed, we noted that she may not have sustained damage; that she may have received more than she had bargained for. See concurring opinion, Zenoff, State ex rel. Dep't Hwys. v. LoBue, 83 Nev 221, 427 P.2d 639 (1967).

Her amended counterclaim for damages, however, did not allege that the expected benefit from the bargained for county roads would have been greater than the benefit actually received from the construction by the State of the freeway and Tropicana Avenue, resulting in damage. What she did claim was damage by reason of the loss of frontage and access along the northerly and westerly boundaries of her property and the loss of a corner at that intersection.

This particular claim of damage previously had been litigated in the second condemnation trial. At that trial the jury specifically was instructed to determine the damages sustained by LoBue for the loss of frontage and access along the northerly and westerly boundaries of her property and for the loss of the corner. That damage was assessed at $93,777.97. From that amount was deducted the sum of $38,904 representing the benefits LoBue received from the State's construction of the freeway and Tropicana. Judgment was entered on that verdict and has been paid by the State. It is conclusive upon the parties and not subject to relitigation. Clark v. Clark, 80 Nev. 52, 389 P.2d 69 (1964).

The issues of judicial estoppel and collateral estoppel, and the doctrine of Clark v. Clark, supra, were presented

to this court on the last appeal of this case. Had we resolved those issues the trial we are now reviewing on the amended counterclaim would not have occurred. Apparently, our failure to do so caused the trial judge to believe that those doctrines did not bar the damages sought by the amended counterclaim. We did not intend that interpretation of our opinion.

Since LoBue does not claim that the expected benefit from the bargained for county roads would have been greater than the benefit actually received from the construction of the freeway and Tropicana, and since she already had been compensated for the damage she does claim, we reverse the judgment entered upon jury verdict, and remand with direction to enter judgment for the State upon LoBue's counterclaim for damages.

MOWBRAY, C. J.
THOMPSON, J.
GUNDERSON, J.
MANOUKIAN, J.
BATJER, J.

APPENDIX B

Page 1 of Petitioner Mary LoBue's Opening Brief on Cross-Appeal to the Nevada Supreme Court

I.

STATEMENT OF THE CASE

Mary LoBue, the Defendant and counterclaimant herein has filed a cross appeal from that portion of the Judgment on the Verdict that relates to the Second Phase of the trial. This Second Phase permitted the State of Nevada to offset a portion of the compensation awarded in the condemnation trial of 1967, from the damages awarded for the breach of a contract entered into between Mary LoBue and Clark County for the opening and improving of Bond Road (now known as Tropicana Avenue) and Industrial Road. The allowance of such an offset not only violates well established principles of law but also effectively deprives defendant and counterclaimant of a portion of the just compensation guaranteed by Nevada and the Federal Constitutions.

This Court has previously determined that Clark County breached its agreement by its failure to construct the promised roads and that the only issue to be determined in the present proceeding was the matter of damages. See State ex rel. Department of Highways v. LoBue, 83 Nev. 221; 427 P.2d 639 (1967) (LoBue I.) Mary LoBue v. The State of Nevada, 92 Nev. 529; 554 P.2d 258 (1976) (LoBue III.)

In this proceeding the Court concluded that the breach occurred on September 6, 1962, the date on which the

County quit-claimed to the State the parcels of land previously deeded by Mrs. LoBue to Clark County. The eminent domain proceeding by which the State sought to acquire a portion of Mrs. LoBue's property for the right of way for the construction of the

APPENDIX C

Page 7 of Petitioner Mary LoBue's Reply Brief to the Nevada Supreme Court

Monahan's letter reads,

> "With reference to your letter of October 20, 1961 regarding the right-of-way deeded to Clark County by Mr. and Mrs. LoBue for road-way purposes, please be advised that plans have not been abandoned for the construction of these roads but on the contrary, they are to be constructed to a much higher standard than originally planned."

The principle of "just compensation" comes into play in two directions. If any portion of the award provided for in the condemnation proceeding is taken from her, Mrs. LoBue has to that extent been deprived of the just compensation guaranteed by the State and federal constitutions for the property acquired for the freeway and the damages accruing from the taking of a portion of her property and the construction of the freeway improvement. On the other hand, if the damages awarded for the breach of contract are diminished, she has been deprived of the compensation due to her for the 4.17 acres deeded for road purposes. The contractual right to have the proposed roads constructed as promised adds to the value of the remaining property. The State's intervention which frustrated the County's project had the effect of depriving Mrs. LoBue of a substantial element of value. While there may have been some question in the past as to whether the taking of a contractual right that gives value to property was compensable, this issue has now been fully resolved by

APPENDIX D

Pages 17, 18 and 19 of Petitioner Mary LoBue's Petition for Rehearing to the Nevada Supreme Court

[Page 17]

* * * from that figure, the value of LOBUE's property as of the same date, assuming that the Freeway, Off-Ramp and Tropicana were completed at that date and further subtracting the net condemnation verdict reached in 1967 including the additional land taken as well as all net severance damages, or a net figure of $285,640.64.

This is precisely what the STATE was seeking by way of its appeal from the last trial. This would also permit LOBUE to have her day in court as was contemplated by this Court in its first Opinion, when it stated:

> "We express no opinion on the point of damages. Perhaps the highway construction by the State benefitted LOBUE as much as the originally planned county roads. Perhaps not."

In all its prior decisions, this Honorable Court has held that LOBUE was entitled to a trial to determine her damages, if any. To now hold that she is not entitled to proceed is contrary to the law of the case.

VI.

STATE AND FEDERAL CONSTITUTIONAL QUESTIONS.

The STATE's prayer for relief on appeal was: "Accordingly, and based upon these errors of the trial court, it is respectfully submitted that the Judgment upon the Verdict

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entered in this cause be reversed and remanded together with appropriate instructions to the trial court regarding the measure of damages". (Appellant's Reply Brief, page 23, dated April 27, 1979).

This Court's reversal with directions to enter Judgment for the STATE, not prayed for by the STATE, has now, for the first time, presented serious State and Federal Constitutional questions which would not have arisen had the Court granted the STATE's prayer that "the cause of

[Page 18]

action be reversed * * * and remanded together with appropriate instructions to the trial court regarding the measure of damages".

These serious State and Federal Constitutional questions mandate that a Rehearing is necessary to promote substantial justice.

The serious State and Federal Constitutional questions may be delineated as follows:

1. The decision of this Court effectively deprives LOBUE of her right to a trial by Jury as guaranteed by Section 3 of Article 1 of the Nevada Constitution and the Fourteenth Amendment of the United States Constitution.

2. The decision of this Court has impaired the obligation of contract by depriving LOBUE of her right to damages for a breach in violation of Section 8 of Article I of the Nevada Constitution and the Fourteenth Amendment of the United States Constitution.

3. The decision of this Court has in effect authorized the appropriation of 3.80 acres of LOBUE's property without the payment of either just compensation for the property taken nor the payment of damages for the breach of

contract on the failure of Clark County to perform its promised performance, in violation of Section 8 of Article I of the Nevada Constitution and the Fourteenth Amendment of the United States Constitution.

4. If the trial court failed to properly define the measure of damages, due process requires that the cause be remanded for a new trial with directions.

5. Due process of law requires that if there is any question as to the procedure followed or the propriety of the measure of damages submitted to the jury, the matter should be remanded to the trial court for a new trial with directions.

[Page 19]

* * * Normally, on an appeal from a judgment for damages for a breach of contract, the role of the appellate court is to determine whether there have been any errors of law and whether the judgment or verdict is supported by substantial evidence. It is, of course, not the function of an appellate court to reweigh the evidence. See Utley v. Airoso, 86 Nev. 116, 464 P.2d 778; Solar, Inc. v. Electric Smith Const., 88 Nev. 457, 459; 449 P.2d 649 (1972) Savini Const. Co. v. A & K Earthmovers, 88 Nev. 5, 7; 492 P.2d 125 (1972).

Where an appellate court makes findings of fact contrary to those made by a jury on conflicting evidence, the effect is to deprive the parties of their constitutional right to a jury trial.

VII.

CONCLUSION

For seventeen years now, LOBUE and her counsel have worked diligently to obtain for her the just compensation

guaranteed to a property owner by both the State and Federal Constitutions where private property has been appropriated for public use. It is unfortunate that this case has been presented in a piecemeal fashion as a result, the issues seriously confused. This, however, is not the fault of LOBUE nor of her counsel. The fact is that as a result of this confusion, the State now has title to 3.80 acres of LOBUE's property without having compensated her either for the fair market value of this property, nor in the way of damages for the breach of the agreement to open and improve the roads that were promised. It would be grossly unfair to deprive LOBUE of the benefits of her bargain by a failure to fully examine the facts and the issues presented to this Court in this appeal. A Rehearing should be granted and the Judgment affirmed.

APPENDIX E

Opinion

THE STATE OF NEVADA, ON RELATION OF ITS DEPARTMENT OF HIGHWAYS, APPELLANT, *v.* MARY LOBUE, RESPONDENT.

No. 5228

May 18, 1967 427 P.2d 639

Appeal from judgment of the Eighth Judicial District Court, Clark County; George E. Marshall, Judge.

Condemnation case. From an award entered by the lower court the state appealed. The Supreme Court, THOMPSON, C. J., held that where grantor by unconditional grant deed conveyed to county, which made an unconditional acceptance, and where the underlying consideration, given sincerely and innocently in the belief that it would be fulfilled, failed, grantor could not sue in equity to cancel deed but was left only to an action at law for damages.

Judgment reversed and cause remanded.

[Rehearing denied June 29, 1967]

Harvey Dickerson, Attorney General, Carson City, and *Melvin L. Beauchamp,* Deputy Attorney General, for Appellant.

Foley Brothers, of Las Vegas, and *Cooper and Nelson* of Los Angeles, California, for Respondent.

1. COUNTIES.

Evidence in condemnation case sustained findings that grantor was induced to execute deed to county because of representations by authorized agents of county that her remaining

property would be benefited by having 2900 feet of additional frontage along the roads to be constructed by the county, that representations were sincerely and innocently made in the belief that they would be fulfilled, that county did not build roads, that consideration for conveyance failed and that grantor did not intend gift or a dedication of the land for public use.

2. DEEDS.

Mere statement of use to which land conveyed is to be devoted, and in consideration of which conveyance is made, does not subject estate transferred to a condition subsequent. NRS 111.170.

3. CANCELLATION OF INSTRUMENTS.

Failure of consideration for unconditional grant deed, without more, does not justify equitable relief, and grantor's remedy when bargained for consideration fails is an action at law for damages.

4. DEEDS.

Conveyance in consideration of promise to support grantor is treated differently than an ordinary commercial conveyance.

5. CANCELLATION OF INSTRUMENTS.

Where grantor by unconditional grant deed conveyed to county, which made an unconditional acceptance, and where underlying consideration, given sincerely and innocently in the belief that it would be fulfilled, failed, grantor could not sue in equity to cancel deed but was left only to an action at law for damages.

OPINION

By the Court, THOMPSON, C. J.:

This is a condemnation case commenced by the State against Mary LoBue to acquire two separate parcels of land (5.19 acres) in Clark County for interstate highway purposes. Sometime before trial the parties, through counsel, stipulated that the ownership of another parcel of land (3.80 acres) to which the State held record title adverse to LoBue's claim of ownership, could be decided by the Court in this litigation.[1] It was understood that if the court

[1]On March 4, 1957 LoBue, by grant deed, had conveyed the disputed acreage to Clark County. On September 6, 1962 the County, by

found for LoBue the scope of the condemnation case would be enlarged to embrace all of the land, that is 8.99 acres, and the cause then tried to a jury to find just compensation and assess severance damages. On the other hand, should the court rule for the State, the disputed parcel would not be included in the condemnation jury trial. The case thus became a bifurcated affair—the first dispute, an equitable proceeding, to be resolved by the court; and the second, the condemnation case, to be decided by a jury.

The district court ruled that LoBue was the owner of the disputed land, and, in effect, cancelled the deeds through which the State had acquired title. Consequently all three parcels totalling 8.99 acres were included in the jury trial which followed. The jury awarded LoBue $548,525 as just compensation for the property taken; $108,205 severance damages; and found that the remainder of some of her property was benefited by the highway to the extent of $5,000. A judgment for $651,730 with interest then accrued of $127,567.40 was duly entered. This appeal by the State ensued.

The main claim of error is addressed to the court's finding that LoBue was the owner of the disputed acreage to which the State held record title. Since the jury returned a lump sum verdict for all of the property condemned ($548,525) without assessing compensation for each parcel separately, and as the failure to segregate by parcel likewise affects the lump sum severance damages awarded, this assigned error, if sustained, requires a reversal of the

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quitclaim deed, conveyed its title to the State. The stipulation provided, inter alia, that Clark County need not be joined as a party to the litigation and that LoBue could assert against the State all rights and remedies that she may have had against Clark County.

entire case. It is our opinion that the ruling below vesting ownership of the disputed parcel in LoBue, thus subjecting that parcel to the condemnation suit, was clearly erroneous. Therefore, we reverse and remand for another trial to determine just compensation, severance damages, and benefits, if any, due to the State's condemnation of the two parcels totalling 5.19 acres. The disputed parcel (3.80 acres) is removed from this litigation and the State's title thereto confirmed.

[Headnote 1]

On March 4, 1957 LoBue, by grant deed, conveyed the disputed parcel (3.80 acres) to Clark County. The County Commissioners, by resolution, accepted the conveyance unconditionally and recorded the deed. On September 6, 1962 Clark County conveyed its title to the State. The trial court made the following relevant findings: That LoBue was induced to execute the deed to the County because of representations by authorized agents of the County that her remaining property would be benefited by having 2900 feet of additional frontage along the roads to be constructed by the County; that representations were sincerely and innocently made by the County agents in the belief that they would be fulfilled; that the County did not build the roads; that the consideration for the conveyance failed; and that LoBue, as grantor, did not intend a gift or a dedication of the land for public use. As we read the record each finding is supported by substantial evidence.

[Headnote 2]

We turn first to examine the grant deed. It is unconditional in form. The words used are: "* * * the undersigned grantor does hereby grant, bargain, sell and convey to

Clark County, Nevada, for street and road purposes, all of the following described land * * *." Those words do not provide for termination of the estate conveyed upon the occurrence or non-occurrence of a specified event. It is well settled that a mere statement of the use to which the land conveyed is to be devoted, and in consideration of which the conveyance is made, does not subject the estate transferred to a condition subsequent. I Rest. Prop. Sec. 45, p. 143; 3 Powell, Real Property, p. 143; Greene v. O'Connor, 25 A. 692 (R.I. 1892); Fuchs v. Reorganized School Dist., 251 S.W.2d 677 (Mo. 1952); Gramer v. City of Sacramento, 41 P.2d 543 (Cal. 1935); Booth v. Los Angeles County, 12 P.2d 72 (Cal.App. 1932); See also NRS 111.170 [where it is provided that the words "grant, bargain and sell" are used to convey an estate in fee simple unless restrained by express terms contained in the deed]. Additionally, we note that the deed does not provide for reverter to or re-entry by the grantor.

The acceptance of the deed by the County was likewise unconditional. [Cf. State ex rel. Dep't of Hwys. v. Wells Cargo Inc., 82 Nev. 82, 411 P.2d 120 (1966) where Clark County accepted a grant deed from Wells subject to a condition—the right of Wells to encroach upon the property conveyed where Wells' weighing installations were located—and the Court held that Wells had retained an easement which was compensable in an eminent domain proceeding.] Thus, an absolute, unconditional transfer of title occurred when LoBue made and delivered her grant deed to Clark County.

The consideration for that conveyance failed. Clark County did not construct the roads. That failure, however, was not accompanied by fraud or bad faith on the

part of the County. The County acted in good faith in making its representations. Apparently it did not complete the road project because the State's proposed highway plan rendered the County project unnecessary.

[Headnote 3]

The State's claim of error centers on the proposition that failure of consideration for an unconditional grant deed, without more, does not justify equitable relief. Fraud in the inception of the transaction, or some kindred circumstance, must exist before recission or cancellation is in order. Abundant case authority sustains this contention. Desert Centers, Inc. v. Glen Canyon, Inc., 356 P.2d 286 (Utah 1960); Williams v. Sullivan, 138 S.E.2d 368 (Ga. 1964); City of Cleveland v. Herron, 131 N.E. 489 (Ohio 1921); Suburban Properties, Inc. v. Hanson, 382 P.2d 90 (Ore. 1963); Hewett v. Dole, 124 P. 374 (Wash. 1912); Miller v. Village of Brookville, 89 N.E.2d 85 (Ohio 1949); Lawrence v. Gayetty, 20 P. 382 (Cal. 1889); Borden v. Byvin, 130 P.2d 718 (Cal.App. 1942); Norby v. Pister, 250 P.2d 633 (Cal.App. 1952). The grantor's remedy when the bargained for consideration fails and a reason for equitable relief is not present, is an action at law for damages.

[Headnote 4]

LoBue acknowledges the law as we have stated it but insists that Nevada has adopted a different rule; that failure of consideration, without more, will, in this State, allow equity to intervene and cancel a deed. Kerr v. Church, 74 Nev. 264, 329 P.2d 277 (1958). Though it is true that in Kerr this court affirmed a decree cancelling a deed upon the ground that the consideration therefore failed, we think that case properly falls within a well

established exception to the rule we have just related. The prevailing view in this country favors the recission of a deed if the grantee fails to perform his promise to support the grantor. The essence of Kerr was the failure of the grantee to allow the grantor, during his lifetime, to jointly use the home which was the subject of the deed. Clearly this was a form of support. The rationale underlying the "support exception" varies: inadequacy of the legal remedy (Ford v. Ford, 43 N.E.2d 756 (Ohio 1942)); theory of a breach of a condition subsequent (Nadler v. Nadler, 8 N.W.2d 306 (Wis. 1943)); the failure to support raises a presumption of fraud at the inception of the transaction (DaCosta v. Bischer, 122 N.E. 819 (Ill. 1919)); (Sethmann v. Bulkley, 61 P.2d 765 (Cal. 1936)); and, the mere failure of consideration (Martinez v. Martinez, 141 P. 469 (Colo. 1914)). Whatever the reason assigned, it is clear that a conveyance in consideration of a promise to support the grantor is treated differently than an ordinary commercial transaction. Comment: 9 U.Pitt.L.Rev. 206 (1948); annot. 112 A.L.R. 670.

In addition to the Kerr case our attention is directed to the decision of Russell v. Ruffcorn, 54 Nev. 162, 10 P.2d 632 (1932) where, on appeal, the court directed cancellation of a deed because the consideration therefor failed. In that case, however, the parties had also executed a contract which provided that the deed was to be accepted as part payment for stock held in escrow pursuant to a conditional permit of the Commissioner of Corporations of California under which the stock was not to be sold without the written consent of the Commissioner. His consent was not secured, though both parties to the agreement, at the

time it was entered into, apparently believed that no difficulty would be experienced in obtaining the Commissioner's consent—a mutual mistake. That circumstance, coupled with the failure of consideration, led the court to decree equitable relief. Such additional factors are not present in the case at hand.

[Headnote 5]

We conclude that, in these circumstances, the grantor's (LoBue) remedy for the failure of Clark County to construct the roads is an action at law for damages; not a suit in equity to cancel the deed. The reason for withholding equitable relief is the need for preserving the finality of a deed and the integrity of title to real property. This can best be accomplished by limiting the grantor to the remedy of damages. We express no opinion on the point of damages. Perhaps the highway construction by the State along the disputed parcel benefited LoBue as much as the originally planned County roads; perhaps not. That question was not presented to the trial court for decision.

For the reasons expressed the judgment below is reversed and the cause remanded.

COLLINS, J., concurs.

ZENOFF, J., concurring:

The peculiar circumstances surrounding the execution of the grant deed for road purposes captured more than my usual interest because I was the trial judge in State ex rel. Dep't of Hwys. v. Wells Cargo, Inc., 82 Nev. 82, 411 P.2d 120 (1966). Initially, I did not see the distinction between the subject of the deed in this case from the execution of the deed to the county in the Wells case. It seems clear now that Mr. Justice Badt found that in Wells the

trial judge was correct in his conclusion, though not in the way in which he arrived at it.

In this case, LoBue gave the deed for street and road purposes in return for a promise that a road would be constructed along the remainder of the property. An interstate highway was built on the property, though not by the promising party and not to the same specifications as originally promised. Yet, not only was the promise kept but the road is a much more travelled artery as an interstate highway than as a county road. It is reasonably probable that respondent received even more than bargained for.

APPENDIX F

Order of the Nevada Supreme Court Dismissing Petitioner Mary LoBue's Appeal from the 1967 Condemnation Trial

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY LO BUE, APPELLANT, *v.* THE STATE OF NEVADA, ON RELATION OF ITS DEPARTMENT OF HIGHWAYS, RESPONDENT.

No. 6053

November 26, 1969

ORDER DISMISSING APPEAL

The notice of appeal in this case was filed on March 28, 1968. The appellant has failed to cause the record on appeal to be filed and docketed with this court. Furthermore, she has failed to seek an extension of time for filing and docketing the appeal. In addition the appellant has failed to file with this court her designation of contents of record on appeal.

On November 4, 1969, the respondent filed its motion to dismiss the appeal. In the following cases the appeal was dismissed when there was no request made for an extension of time in which to docket the record: Doolittle v. Doolittle, 70 Nev. 163, 262 P.2d 955 (1933); Bank of Nev. v. Drayer-Hanson, 70 Nev. 416, 270 P.2d 668 (1954); Cole v. Cole, 70 Nev. 486, 274 P.2d 358 (1954); McDowell v. Drake, 77 Nev. 136, 360 P.2d 257 (1961); Board of

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Trustees v. Savage, 77 Nev. 327, 363 P.2d 354 (1961); Dreyer v. Dreyer, 74 Nev. 167, 325 P.2d (1958).

The appellant has failed to comply with Supreme Court Rule 26(3) by serving and filing her reply to the motion to dismiss more than ten (10) days after the respondent had filed its motion to dismiss.

Good cause appearing, IT IS ORDERED that the respondent's motion to dismiss the appeal is granted.

Dated this 26th day of November, 1969.

COLLINS, C. J.
ZENOFF, J.
BATJER, J.
MOWBRAY, J.
THOMPSON, J.